84-1230

No. 85—

IN THE SUPREME COURT OF THE
UNITED STATES

January Term, 1985

CITY OF NORTH MUSKEGON,
a Michigan municipal corporation;
NORTH MUSKEGON POLICE DEPARTMENT,
CITY COUNCIL, and POLICE CHIEF,

Petitioners,

vs.

RICHARD BRIGGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether, and to what extent, if any, the constitutionally protected right of privacy applies to the private, yet unlawful, sexual activity of heterosexual adults.

II.

Whether, and to what extent, if any, the constitutionally protected right of privacy applies to the unlawful extra-marital sexual activity of heterosexual adults.

III.

Whether the engaging in unlawful extra-marital sexual activities between heterosexual adults is a fundamental right protected by the First and Fourteenth Amendments to the United States Constitution.

IV.

Whether a city council policy prohibiting its police officers from cohabitating,contrary to State adultery statutes, within the city limits with persons of the opposite sex where both such officer and person are married to other parties is a reasonable exercise of municipal powers.

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Petitioners, City of North Muskegon, a Michigan municipal corporation; North Muskegon Police Department, City Council, and Police Chief, pray that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 2, 1984.

THE PARTIES

The Petitioners in this case are the City of North Muskegon, a Michigan municipal corporation; its Police Department; its City Council, being the primary governing body of the City of North Muskegon; and its Police Chief.

The Respondent, Richard Briggs, is an individual, and formerly aid police officer employed by Petitioner City of North Muskegon.

OPINIONS AND ORDERS OF COURTS BELOW

The written Opinion of the District Court was entered in this cause on May 5, 1983. The Judgment of the District Court was entered May 26, 1983. The Opinion of the Sixth Circuit Court of Appeals affirming the decision of the District Court was entered on October 2, 1984. The Order of the Court of Appeals denying Petitioners' Motion for Rehearing in said Court was entered on November 6, 1984.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on October 2, 1984.

Petitioners' Motion for Rehearing was denied by the Court of Appeals pursuant to its Order entered November 6, 1984. This Petition for a Writ of Certiorari is being filed within ninety (90) days of that date and jurisdiction is conferred upon and in this Court pursuant to 28 USC 1254(1) to review the Orders of the Court of Appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Michigan Compiled Laws, Section 750.29 et seq. which states:

> "Sec. 29. Definition. Adultery is the sexual intercourse of two (2) persons, either of whom is married to a third person. Sec. 30. Punishment; application to unmarried man. Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment."

Michigan Compiled Laws, Section 750.335, which states:

> "Sec. 335. Lewd and lascivious cohabitation, gross lewdness and lascivious behavior; one year limitation. Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by fine of not more than $500.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense."

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, Section I:

> "Citizenship; security of persons and property, due process and equal protection clauses. SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Petitioner City of North Muskegon, a Michigan municipal corporation, is a geographically small community, only approximately 1/2 mile wide and 3 miles long, and having a population of 3,869 persons.

At the times relevant to the within matter, the City's police department employed 3 to 4 full-time police officers, including the police chief and also employed approximately 6 part-time police officers.

Respondent, Richard Briggs, was employed as a part-time police officer with the City of North Muskegon from 1969 until February, 1977. As such, he normally worked between 3 and 5 eight hour shifts per month as a patrolman at a rate of $3.90 per hour at the time of his suspension.

Briggs had no formal or special police training and usually worked on week-ends, holidays, and full-time officers' sick days.

While employed as a part-time police officer, Briggs also worked full time as an accounts payable supervisor for a local manufacturing concern, Howmet Corporation.

Sometime in January, 1977, Briggs moved from his marital residence, staying briefly in local motels with his paramour, including a motel located just a short distance from the city limits.

Shortly thereafter, Briggs and one Cynthia Secrest, a married woman and fellow Howmet employee with whom Briggs had developed an intimate relationship before leaving his wife, moved into an apartment within the City of North Muskegon, said apartment being located approximately one block from the central business district of North Muskegon.

At the time Briggs commenced his cohabitation with Mrs. Secrest he had not initiated divorce proceedings from his wife, although he did become divorced from his wife in October, 1977, long after his February, 1977 suspension from the police force.

On or about January 28 or 29, 1977, Briggs informed the then North Muskegon Police Chief, Harold Mirkle, that he had separated from his wife and that he was cohabitating with Cynthia Secrest. At that time, both Briggs and Mrs. Secrest were still married to other individuals. Briggs' cohabitation also became known at the same time by other citizens and members of the North Muskegon City Council.

On February 15, Briggs was suspended from the North Muskegon Police Department until such time as his conduct was not unbecoming an officer. Briggs requested and was granted a formal public hearing on the matter of his suspension, said hearing being held in August, 1977.

At the hearing, Briggs openly admitted that he was cohabitating with a woman not his wife while he was still married and that he intended to continue his adulterous living arrangements.

At the August hearing, City Council members expressed concern about Briggs' ability to make important judgments and examined evidence that his off-duty activities affected his ability to perform his functions as a police officer. It was also observed by Council members that Briggs' cohabitation status was generally known within Briggs' "neighborhood" and that at least one Council member was questioned by local citizens concerning the off-duty conduct of Briggs. This all became known within one week's time.

Additionally, at the time of Briggs' admitted cohabitation, there existed two Michigan state statutes expressly relating to his extra-marital conduct, namely: MSA 28.218, et seq., MCL 750.29 et seq., proscribing adulterous activity, and MSA 29.567, MCL 750.335, prohibiting lewd and lascivious cohabitation.

After conducting the public hearing and considering Briggs' admissions as to his off-duty conduct as well as all other relevant evidence, the City Council determined to uphold Briggs' suspension and discharge.

The Council's determination was based upon the fact that a law enforcement officer's off-duty conduct should not be an open and apparent violation of State Penal Laws; that the apparent violation of such laws adversely affected the police officer's law enforcement duties and responsibilities; and that such conduct also adversely reflected upon the City and its police department because of their responsibilities to enforce and uphold the laws.

II. PROCEDURAL HISTORY AND BASIS OF JURISDICTION OF TRIAL COURT.

This is an action originally filed by Respondent in the United States District Court for the Western District of Michigan, Southern Division, pursuant to 42 USC § 1981, 1983, and 2000E et seq., seeking compensatory and punitive damages for the allegedly unlawful discharge of Respondent from his position as a part-time police officer with the City of North Muskegon. Additionally, Respondent claimed disparate treatment in violation of his civil rights.

Pursuant to Federal Rule of Civil Procedure 12c, Petitioners moved for Judgment on the pleadings of May 5, 1980. In a written Opinion dated May 20, 1981, the trial court dismissed all of Respondent's claims under 42 USC § 1981, 1983 and 2000E et seq., but denied Petitioners' Motion for Dismissal on the constitutionally related claims.

Additionally, the trial court, *sua sponte*, grounded or characterized Respondent's claims as being brought under constitutionally protected privacy rights despite the fact that Respondent's own pleadings contained no such allegations, either expressly or implicitly.

Trial in the within cause was held before the Court on January 4 and 5, 1983.

By its written Opinion and Order of May 5, 1983, the District Court held that the discharge of Respondent from his position as a part-time police officer violated his constitutionally protected privacy rights and Judgment in favor of the Respondent was entered.

The Court also ordered a supplemental hearing for purposes of determining appropriate relief, which was held on

May 16, 1983. Pursuant to that hearing, the Court, by written Judgment of May 26, 1983, awarded to Respondent the sum of $35,000.00 as compensatory damages for his lost wages, mental anguish, and humiliation.

Petitioners then filed a timely appeal of the trial court's decision with the United States Court of Appeals, Sixth Circuit. Petitioners' Notice of Appeal was filed on June 3, 1983.

By written Opinion entered October 2, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the United States Disrict Court and remanded the case for a recomputation of damages.

Petitioners then filed their Petition for Rehearing with the Sixth Circuit Court of Appeals. By Order of November 6, 1984, said petition was denied.

The Court of Appeals then prematurely issued the Mandate in the within case on November 14, 1984. Subsequently, Petitioners filed their Petition for an Order rescinding issuance of the Mandate pending application for Writ of Certiorari. Said petition was construed by the Court of Appeals as a Motion to recall the Mandate and by Order dated November 28, 1984, the Court granted the Petition and recalled the Mandate as "improvidently issued".

REASONS FOR GRANTING THE WRIT

This case represents an important issue upon which a significant number of Federal District Courts and Courts of Appeal have rendered diverse and conflicting decisions, rulings, analyses, and supporting rationale, that issue being the nature and extent of the application of the constitutionally

protected right to privacy to the unlawful extra-marital sexual activities of heterosexual adults who are also public employees.

Although the Supreme Court has never specifically recognized the existence of a constitutionally protected right to engage in felonious extra-marital activity, the Supreme Court has never, in a factual context comparable to that raised in the instant case, squarely confronted or ruled definitively upon whether or to what extent the constitutionally protected right to privacy extends or applies to the off-duty illegal private sexual conduct of heterosexual adults who are not married to each other and who are public employees.

For the reasons stated supra, this Court's decision on the issues raised in the instant case would firmly and definitively resolve the unanswered and unresolved issues raised herein and would provide the required precedential standards necessary for future consistent resolution of issues analogous to the issues raised herein by the District and Appellate Courts of the Federal Judiciary.

I.

SUPREME COURT REVIEW OF THE INSTANT CAUSE IS NECESSITATED BY THE EXISTENCE OF CONFLICTING DECISIONS BY FEDERAL COURTS OF APPEAL ON THE SAME OR SIMILAR ISSUES AND SUBJECT MATTER.

Petitioners contend that the decisions entered by the District Court and the Sixth Circuit Court of Appeals in the instant case are in direct conflict with the decision, in a case of similar factual context, of the United States Court of Appeals for the Fifth Circuit in the case of *Shawgo* v *Spradlin*,

701 F2d 470 (1983); Petition for Certiorari denied November 7, 1983, 78 L Ed 2d 345 (1984).

Thus, in *Spradlin*, Plaintiffs were employed as police officers by the Amarillo, Texas Police Department. Plaintiffs met, became socially involved, and eventually commenced cohabitation. Plaintiffs were disciplined pursuant to police department rules and regulations prohibiting such conduct.

Plaintiffs filed suit in the United States District Court for the Northern District of Texas alleging, among other things, violation of constitutionally protected privacy rights. The District Court upheld the disciplinary actions taken by the Amarillo Police Department and the Fifth Circuit Court of Appeals affirmed the decision of the trial court.

In so doing and in addressing the privacy related issues raised on appeal, the Fifth Circuit stated:

"[13] We agree with the district court that, in the present circumstances, the plaintiffs' right to privacy has not been infringed by the scope of the regulation proscribing, as conduct prejudicial to good order, cohabitation of two police officers, or proscribing a superior officer from sharing an apartment with one of lower rank. The fourteenth amendment 'protects substantive aspects of liberty'—including freedom of choice with respect to certain basic matters of procreation; marriage, and family life, *see, e.g., Roe* v. *Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965)—'against unconstitutional restrictions by the state.' *Kelley* v. *Johnson*, 425 U.S. 238, 244, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708 (1976). The first amendment additionally imbues the right to privacy to include protected forms of 'association' for social as well as political reasons. See *Griswold* v. *Connecticut, supra*, 381 U.S. at 483, 85 S.Ct. at 1681.

The plaintiff police officers, who were found to have violated police and state rules of conduct by reason of their personal, off-duty association that led to their marriage, contend that the state may not regulate these private activities. This argument fails to take into account the fact that the right to privacy is not unqualified, *Roe* v. *Wade, supra,* 410 U.S. at 154, 93 S.Ct. at 728, and that the state has 'more interest in regulating the activities of its employees than the activities of the population at large,' *Kelley* v. *Johnson, supra,* 425 U.S. at 245, 96 S.Ct. at 1444."

"[14] To sustain the attack on these police personnel regulations, the plaintiff officers must 'demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property.' *Id.* In this case we do not attempt to outline all the contours of a police department's scope of regulation of the off-duty activities of its employees, for we can ascertain a rational connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit."

In the instant case, the trial court and the Sixth Circuit Court of Appeals found Respondent's extra-marital sexual activities to be within the zone and scope of constitutionally protected fundamental rights and thereafter held that Petitioners could not proscribe that right by application of the disciplinary actions taken. In so doing, the Court completely ignored the fact that Respondent's actions were in direct violation of the cited Michigan adultery statute, being MCL 750.29 et seq. As such, Petitioners contend that the Sixth Circuit decision is in direct conflict with the Fifth Circuit decision in *Spradlin* wherein the Court upheld the disciplinary action of the Amarillo Police Department even though the

Plaintiffs' activities were not alleged to be in violation of any Texas state law.

As there is a direct and obvious split in the decision of the Fifth and Sixth Circuit Courts of Appeal on issues of a substantially similar nature, the definitive pronouncement of this Court is necessary and the Petition for Certiorari should therefore be granted.

II.

SUPREME COURT REVIEW OF THE INSTANT CASE IS NECESSITATED BY THE EXISTENCE OF CONFLICTING DECISIONS BY FEDERAL DISTRICT COURTS AND STATE COURTS ON THE SAME OR SIMILAR ISSUES AND SUBJECT MATTER.

As stated by Justice Brennan in his Opinion dissenting from the denial of certiorari in the case of *Janet Shawgo Whisenhunt. et vir, Petitioners,* v *Lee Spradlin, et al,* Respondents Petition for Certiorari denied November 7, 1983,

> "Although issues concerning the regulation of the private conduct of public employees arise frequently, the lower courts have divided sharply both in their results and in their analytic approach, and guidance from this Court is unquestionably needed."

Petitioners herein contend that as stated by Justice Brennan, lower Federal Courts, and State Courts, have been and remain sharply divided on the resolution of issues similar to those raised in the within action. Justice Brennan's dissent was joined by Justices Marshall and Blackmun.

Thus, many such courts have held that extra-marital heterosexual activity, including unlawful and adulterous activity, is

not constitutionally protected and may be proscribed and prohibited by public employers. *Baron* v. *Meloni,* 556 F Supp 796 (W.D. N.Y. 1983); *Suddarth* v. *Slane,* 539 F Supp 612 (W.D. Va. 1982); *Johnson* v. *San Jacinto Jr. College,* 498 F Supp 555 (S.D. Tex. 1980); *Wilson* v. *Swing,* 463 F Supp 555 (M.D. N.C. 1978); *Hollenbaugh* v. *Carnegie Free Library,* 436 F Supp 1328 (W.D. Pa. 1977); *cert. denied,* 439 US 1052 (1978); *Fabio* v. *Civil Service Commission of the City of Philadelphia,* 373 A.2d 751 (1977); *Richter* v. *Civil Service Commission of the City of Philadelphia and the Philadelphia Police Force,* 387 A.2d 131 (1978); *Smith* v. *Price,* 616 F2 d 1371 (1980).

On the other hand, other courts have reached opposite conclusions on substantially parallel issues. *Baker* v. *Wade,* 553 F Supp 1121 (N.D. Tex. 1982); *New York* v. *Onofre,* 434 N.Y.S. 2d 947, 415 N.E. 2d 936 (N.Y. 1980), *cert. denied,* 451 US 987 (1981); *Shuman, supra; State* v. *Saunders, supra; Smith* v. *Price,* 446 F Supp 828 (M.D. Ga. 1977), *rev'd on other grounds,* 616 F2d 1371 (5th Cir. 1980); *Krzyzewski* v. *Metropolitan Government of Nashville,* 14 E.P.D. 7725 (E.D. Ill. 1977); *Drake* v. *Covington County Board of Education,* 371 F Supp 974 (M.D. Ala. 1974); *Fisher* v. *Snyder,* 346 F Supp 396 (D. Neb. 1972) *aff'd,* 476 F2d 375 (8th Cir. 1973); *Mindel* v. *United States Civil Service Commission,* 312 F Supp 485 (N.D. Cal. 1970).

Petitioners contend the better view, especially in cases involving *unlawful extra-marital sexual activity,* is expressed by the decisions which refuse to extend the constitutionally created privacy rights and protections to felonious off-duty extra-marital sexual activities by law enforcement officers.

Thus, in the case of *Suddarth* v. *Slane,* 539 F Supp 612 (1982), in addressing the propriety of disciplinary action taken against a Virginia state trooper as a result of his adulterous

activity, the United States District Court for the Western District of Virginia stated:

> "However, the conduct in question is not protected by the First or Fourteenth Amendments. After an examination of the United States Supreme Court's opinions in *Griswold* v. *Connecticut*, 381 US 479, 85 S Ct 1678, 14 L Ed 2d 510 (1965), and *Poe* v. *Ullman*, 367 US 497, 81 S Ct 1752, 6 L Ed 2d 989 (1961), the Court is of the opinion that adultery is not protected by the First Amendment. *Accord, Sullivan* v. *Meade Ind. School Dist.*, 530 F2d 799 (8th Cir. 1976); *Johnson* v. *San Jacinto Jr. College*, 498 F Supp 555 (S.D. Tex. 1980); *Wilson* v. *Swing*, 463 F Supp at 563; *Hollenbaugh* v. *Carnegie Free Library*, 436 F Supp 1328 (W.D. Pa. 1977), aff'd, 578 F2d 1374 (3rd Cir.) (unpublished), cert. denied, 439 US 1052, 99 S Ct 734, 58 L Ed 2d 713 (1978). This is particularly true where the Commonwealth of Virginia has a law in Virginia Code § 18.2-365 which prohibits adultery. See e.g., *Hollenbaugh* v. *Carnegie Free Library*, 439 US 1052, 1054, 99 S Ct 734, 735, 58 L Ed 2d 713 (1978) (Marshall J., dissenting from denial of certiorari)." (pp 617 & 618).

In *Wilson* v. *Swing*, 463 F Supp 555 (1977), the United States District Court M.D. North Carolina, upheld the disciplining of a Greensboro police officer for off-duty adulterous conduct engaged in contrary to departmental rules and a North Carolina statute proscribing such activity.

In rejecting Plaintiff's claim of the department's violation of his constitutional rights, the court stated:

> "The Court is of the opinion that adultery is not protected by the First Amendment's guarantee of freedom of association. See *Griswold* v. *Connecticut*, 381 US 479, 499, 85 S Ct 1678, 14 L Ed 2d 510 (1965) (Goldberg, J., concurring); *Poe* v. *Ullman*, 367 US 497, 553, 81 S Ct 1952, 6 L Ed 2d 989 (1961) (Harlan, J., dissenting)." (P 563).

Further, in *Baron* v. *Meloni*, 556 F Supp 796 (1983) United States District Court, Western District, New York, Plaintiff was a deputy sheriff with the Monroe County Sheriff's Department.

Plaintiff became romantically involved with the wife of an organized crime figure who was under police surveillance. Plaintiff was ordered by the department to cease his romantic activities but refused to do so and was terminated for insubordination.

Plaintiff filed suit in Federal Court alleging violation of his constitutional rights of association and of privacy. In rejecting Plaintiff's claims, the Court stated:

> "This Court has not found any authority extending the First Amendment freedom of association to extra-marital affairs or social relationships as present in the case before this Court. (See discussion in Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 673-676 (1980); *Bumpus* v. *Clark*, 681 F2d 679-685 (9th Cir. 1982); *International Society for Krishna Consciousness of Houston, Inc.* v. *City of Houston, Inc.*, 689 F2d 541, 556 (5th Cir. 1982). Nor does it appear in the present case that any other recognized associational activities have been infringed, such as union activities, *Robinson* v. *State of New Jersey*, 547 F Supp (D.J.J. 1982), or association in conjunction with other firmly recognized civil rights, as in a situation with the promotion of controversial beliefs or ideas, see, *Runyon* v. *McCrary*, 427 US 160, 175, 96 S Ct 2586, 2596, 49 L Ed 2d 415 (1976). While certain

associational interests, under appropriate circumstances are entitled to constitutional protection, that protection is not extended to the extra-marital association in this case." (P 799).

The Court further stated:

"The right of privacy, which limits governmental intrusions and restrictions on an individual's decisions and choice applies in 'matters relating to marriage, procreation, contraception, family relationships and child rearing and education'. *Paul v. Davis,* 424 US 693, 713, 96 S Ct 1155, 1166, 47 L Ed 2d 405 (1976). Thus, contrary to plaintiff's assertion that the right of privacy guarantees a general 'right to marry' the right of privacy in relation to the protection of sexual intimacy and concomitant matters only extends to persons in a marital relationship. *Johnson* v. *San Jacinto Junior College,* 498 F Supp 555, 573-76 (S.D. Tex. 1980). (See discussion in Karst, The Freedom of Intimate Association. 89 Yale L.J. at 667-73, supra)." (P 800).

As the lower Federal Courts and a number of State Courts remain substantially divided on the issues raised herein, and as the Sixth Circuit Court of Appeals has apparently adopted a view and application of the law which is highly inconsistent with the holdings and analyses set forth above, Petitioners request review of the decision of the Court of Appeals by this Court.

III.

ALTHOUGH NEVER SPECIFICALLY RECOGNIZING THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED RIGHT TO ENGAGE IN EXTRA-MARITAL SEXUAL CONDUCT, THE UNITED STATES SUPREME COURT HAS NOT DEFINITIVELY RULED THAT SUCH CONDUCT, INCLUDING UNLAWFUL CONDUCT, IS NOT CONSTITUTIONALLY PROTECTED.

Petitioners contend that the Supreme Court has not definitively, in prior rulings, set forth the rules of law and appropriate analytical approach necessary for proper resolution of the issues raised in the instant case. Thus, in writing for the majority in *Carey* v. *Population Services International,* 431 US 678, 52 L Ed 2d 675, 97 S Ct 2010 (1977), Justice Brennan in Footnote Number 17 stated:

". . . We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults. . . ."

Within this context then, a definitive pronouncement by this Court is necessary to solidify the decisional rift created in the Federal and State Judiciary by application of varying constitutional standards and analyses.

Additionally, although this Court has not in the past definitively and plainly ruled on the precise kinds of issues raised herein, Petitioners contend that this Court has ruled that the constitutionally protected right to privacy is not without limitation.

Thus, Petitioners contend that examination of privacy rights recognized by the United States Supreme Court in *Griswold* v.

Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965), and extended by this Court in *Eisenstadt* v. *Baird*, 405 US 438, 31 L Ed 2d 349, 92 S Ct 1029 (1972), *Carey* v. *Population Services International*, 431 US 678, 52 L Ed 2d 675, 97 S Ct 2010 (1977), *Whalen* v. *Roe*, 429 US 589, 51 L Ed 2d 64, 97 S Ct 869 (1977), and *Moore* v. *City of East Cleveland*, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977), reveals that this Court has not recognized nor created a general right of extra-marital sexual privacy. As such, Petitioners contend that a pronouncement by this Court, consistent with its holdings in the afore-referenced cases, on the issues raised in the within cause would require a reversal of the decision rendered by the Sixth Circuit Court of Appeals and would provide the precedential guidelines necessary for proper future analysis and resoluton of similar issues.

IV.

THE DECISIONS OF THE TRIAL COURT AND SIXTH CIRCUIT COURT OF APPEALS ARE CONTRARY TO PRINCIPLES OF REASON AND SOUND PUBLIC POLICY AND THEREFORE REQUIRE REVIEW BY THIS COURT.

In its Judgment of October 2, 1984, the Court of Appeals affirmed the following conclusions of law and findings of fact as determined by the District Court:

A. That there exists a fundamental, constitutional right to sexual privacy.

B. That Respondent's discharge violated his constitutional rights.

C. That Respondent's job performance was not affected by his extra-marital cohabitation.

D. That Respondent had not violated the statutory provisions prohibiting lewd and lascivious cohabitation as contained in MCLA 750.335; MSA 28.567.

E. That Respondent's discharge by the City of North Muskegon was based upon pretextual reasoning since the "real" reason for the discharge was based upon unproven, anticipated community reaction.

The decision of the Court of Appeals concludes that the District Court properly reached its legal conclusions and there existed sufficient evidence to support the District Court's findings of fact.

Petitioners disagree with the decision of the Court of Appeals and conclusions as set forth, supra, for the following reasons:

First, both the District Court and the Court of Appeals ignored Michigan's adultery statute, being MCLA 750.29 et seq.; MSA 28.218 et seq., in their respective analyses of Respondent's conduct and Petitioners' actions taken in response to that conduct. Further, the aforesaid courts entirely ignored the fact that Respondent openly admitted engaging in felonious adulterous activities in contravention of the laws of the State of Michigan.

Second, as stated, supra, Petitioners contend that a substantial number of other jurisdictions have concluded that extra-marital sexual activity of the type and nature admittedly engaged in by Respondent is not constitutionally protected.

Third, in concluding that Respondent's admitted extra-marital sexual activities were constitutionally protected, both the District Court and the Court of Appeals misinterpreted and misapplied the law. Petitioners further contend that the law of the Federal Judiciary should be that such extra-marital sexual activity is not constitutionally protected.

Fourth, both the District Court and the Appellate Courts ignored and failed to discuss, address, or examine the fact that Respondent, as a law enforcement officer, may be held to a higher standard of off-duty conduct than an ordinary individual. Further, the courts ignored the existence of a substantial line of cases supporting Petitioners' assertions as contained herein.

Fifth, both the District Court and the Court of Appeals failed to consider the prevailing rule of law that the off-duty, illicit sexual conduct of a law enforcement officer, or other such individuals employed in positions of sensitivity and conspicuity, constitutes sufficient grounds for disciplinary action.

Because of the misapplication of law and analytic process applied by the District Court and the Court of Appeals in the within matter, review of those decisions by this Court is mandated.

V.

THE QUESTION OF WHETHER A MUNICIPAL EMPLOYER MAY HOLD ITS LAW ENFORCEMENT OFFICERS TO A HIGHER STANDARD OF ETHICAL, MORAL, AND GENERAL CONDUCT THAN A CIVILIAN EMPLOYER MAY REQUIRE OF ITS EMPLOYEES, WAS NOT ANSWERED BY THE LOWER COURTS IN THE INSTANT CASE AND SAID QUESTION REQUIRES CLARIFICATION THROUGH THE RULING OF THIS COURT.

Petitioners contend that the cases cited in Sections I and II, supra, also reflect a substantial division by Federal District Courts, Federal Courts of Appeal, and State Courts concerning the nature and extent of the standards of off-duty conduct to which a public employer may hold its employees.

Petitioners contend that the better view is that public employees, especially police officers, may be held to a higher standard of off-duty conduct than ordinary civilian employees. *Kelley* v. *Johnson*, 425 US 238, 476 L Ed 2d 708, 96 S Ct 1440 (1976); *Rinaldi* v. *City of Livonia*, 69 Mich App 58, 244 N.W. 2d 609 (1976); *Millsap* v. *Cedar Rapids Civil Service Commission*, 249 N.W. 2d 679 (1977); *City of Tucson* v. *Mills*, 559 Pa 2d 663 (1976).

Further, as it set forth in § I&II, supra, Federal Courts of Appeal have split on the applicable constitutional standards of assessment of public employer activities, rules, and regulations designed to insure a high standard of off-duty conduct by public employees. Thus, the Sixth Circuit, by affirming the decision of the District Court in the instant case, has determined that there must exist more than a rational connection between the objected to state governmental policies

and the promotion of governmental interests. On the other hand, in the case of *Shawgo v. Spradlin*, 701 F2d 470 (1983), cited *supra*, the Fifth Circuit Court of Appeals has specifically held that the test to be applied in cases such as the instant case is the traditional "rational basis test"; i.e., that there need be only a rational connection between the governmental regulation allegedly proscribing the employee's rights and some legitimate govermental interest.

Clearly, again, such a division requires the definitive ruling of this Court.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that this Petition be granted and that this case be set for review and oral argument before the United States Supreme Court.

Dated: January 7, 1985.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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FILED—OCT 2 1984
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD BRIGGS, Plaintiff-Appellee, v. NORTH MUSKEGON POLICE DEPARTMENT; CITY OF NORTH MUSKEGON; CITY COMMISSIONERS, NORTH MUSKEGON; and POLICE CHIEF, NORTH MUSKEGON, Defendants-Appellants.	No. 83-1379

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: MARTIN and JONES, Circuit Judges; and BALLANTINE, District Judge.*

* Honorable Thomas A. Ballantine, Jr., United States District Court for the Western District of Kentucky, sitting by designation.

Per Curiam. This case is before this Court upon appellants' appeal of the district court's order, which directed entry of judgment in favor of appellee and awarded appellee statutory costs, interest, attorney's fees in addition to $35,000 in compensatory damages. Upon consideration of the issues presented by this appeal we affirm the district court's order.

Appellants are the North Muskegon Police Department ("the Police Department"), the City of North Muskegon ("the City"), and North Muskegon's City Commissions ("the Commissioners") and Police Chief. Appellee, Richard Briggs, a part-time police officer for the City, is a married man who engaged in nonmarital cohabitation with a married woman, who was not his wife.

Briggs began his part-time employment with the Police Department in 1969. In January, 1977 he was separated from his wife and in October, 1977 he was divorced. In February, 1977, however, Briggs began cohabitating with a married woman, Cynthia Secrest, who was divorced in June or July of 1977. On February 15, 1978 he was suspended pending "such time as it [was] . . . decided that his actions are not unbecoming a police officer for the City . . . ." On July 1, 1977 Briggs was terminated as of the date of his suspension.

Upon Briggs' request, the Commissioners held a hearing to determine whether his employment should be reinstated. In the hearing, which was held on August 29, 1977, the Commissioners informed Briggs that his nonmarital cohabitation with Secrest violated a state statute.[1] It appears that Briggs was so informed, after he admitted his cohabitation and his

[1]
M.C.L.A. §750.33 provides as follows:

> Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by fine of not more than $500.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense.

intent to continue cohabitation with Secrest. On September 19, 1977 the Commissioners denied Briggs' request for reinstatement.

As a result of the Commissioners' denial, Briggs filed a complaint in the district court and sought relief under the provisions of 42 U.S.C. §§ 1981, 1983, 2000e as well as the provisions of the Fifth and Fourteenth Amendments of the United States Constitution. The district court, however, dismissed Briggs' complaint, because it failed to satisfy two jurisdictional prerequisites: (1) filing a charge with the Equal Employment Opportunity Commission; and, (2) receiving a "right-to-sue letter." After satisfaction of those jurisdictional prerequisites, the district court rendered its final opinion.

In the opinion, the district court stated that the Supreme Court had not definitively answered the question " 'whether and to what extent the Constitution prohibits state statut[ory] regulati[on of] [private consensual sexual] behavior among adults.' " 563 F. Supp. 585, 589 (1983) (quoting *Carey* v. *Population Services International*, 431 U.S. 678, 718 n.2 (1977)). The court also stated that several courts have held that nonmarital sexual conduct is unprotected by the First and Fourteenth Amendments while several other courts have held to the contrary. *Id.* at 589-90. The district court, then stated that "better logic" supported the view that upheld the constitutional right of sexual privacy. *Id.* at 590. The court, therefore, identified sexual privacy as a fundamental constitutional right, despite lack of direction from the Supreme Court. *Id.* at 588. *A fortiori*, the district court made the following conclusion of law: there exists a fundamental, constitutional right to sexual privacy.

The district court's findings of fact, which were several, also resulted in conclusions of law. For example, in scrutinizing appellants' acts the district court found that Briggs' job performance was not affected by his nonmarital cohabitation and, therefore, the court refused to infringe his right to sexual privacy "simply because of general community disapproval . . . ." *Id.* at 590. In scrutinizing Briggs' acts for violation of the state statute, the district court found that the term "lewd" had no commonly accepted definition. The court therefore, refused to conclude that Briggs had violated the statute, since nonmarital cohabitation in and of itself does not amount to lewd and lascivious conduct. *Id.* at 591. The district court also found that (1) appellants' proffered reasons for discharge—Briggs' violation of the state statute and his nonmarital cohabitation's affect upon job performance—were pretextual, since the "real" reason was based upon unproven, anticipated community reaction, *id.* at 592; and, (2) Briggs' claim of disparate treatment was not supported by the evidence. *Id.* Based upon those findings, the district court made the following two conclusions of law. First, Briggs' discharge did not subject him to wrongful disparate treatment. *Id.* Second, his discharge violated his constitutional rights. *Id.*

Although this Court may freely review the district court's legal conclusions concerning the existence of a fundamental right to sexual privacy, the nonexistence of disparate treatment, and the presence of a constitutional violation, its subsidiary factual determinations must be upheld unless clearly erroneous. *Roth Steel Products* v. *Sharon Steel Corp.*, 705 F.2d 134, 143 (6th Cir. 1983). Sufficient evidence, however, supports the district court's findings. Moreover, we believe that the district court properly reached its legal conclusions. Consequently, Briggs is entitled to damages.

The district court awarded statutory costs, interest, attorney's fees as well as $35,000 in compensatory damages. Appellants contend that the district court's award was excessive. In determining the adequacy of the award the test is not whether this Court would have granted a larger award, *Taylor* v. *United States*, 418 F.2d 262 (6th Cir. 1969) but instead whether the trial court abused its discretion. *Smith* v. *Manausa*, 535 F.2d 353 (6th Cir. 1976). We believe that the district court did not abuse its discretion in awarding compensatory damages, so long as the award is limited to damages incurred between the dates of Briggs' termination and the district court's judgment. Briggs, however, is not entitled to post-judgment interest. Moreover, he is not entitled to attorney's fees for legal work performed on the appeal, because his counsel failed to appeal and because the record does not reveal that his counsel withdrew as prescribed by the rules.

For the foregoing reasons we do not find that the district court's findings of fact are clearly erroneous nor its legal conclusions to be incorrect. We, therefore, AFFIRM the district court's order and remand for a recomputation of damages in a manner not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

U.S. Post Office & Courthouse Building
CINCINNATI, OHIO 45202

JOHN P. HEHMAN
Clerk

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October 2, 1984

Harry Knudsen
Jeffery T. Ross

RE: 83-1379 Richard Briggs v.
North Muskegon Police Department et al.
District Court Number 80-00096

Dear Counsel:

Enclosed please find a copy of the Court's decision which was entered today in the above-styled appeal.

Yours very truly,
JOHN P. HEHMAN, CLERK

Tom Bennignus /s/
Tom Bennignus, Deputy

Enclosure

CC: Richard Briggs
Gerald H. Liefer

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED—NOV 6 198-
JOHN P. HEHMAN, Clerk

Richard Briggs, Plaintiff-Appellee, v North Muskegon Police Department; City of North Muskegon; City Commissioners, North Muskegon; and Police Chief North Muskegon, Defendants-Appellants.	NO. 83-1379

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

John P. Hehman /s/
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
CINCINNATI, OHIO 45202

JOHN P. HEHMAN
Clerk

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November 6, 1984

Harry J. Knudsen
Jeffery T. Ross

RE: 83-1379 Richard Briggs
v. North Muskegon Police Department, et al.
District Court Number 80-00096

Dear Counsel:

Enclosed please find a copy of an order which was entered today in the above-styled appeal.

Yours very truly,

JOHN P. HEHMAN, CLERK
Tom Bennignus /s/
Tom Bennignus, Deputy

Enclosure
CC: Richard Briggs

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED—NOV 28 1984
JOHN P. HEHMAN, Clerk

RICHARD BRIGGS, Plaintiff-Appellee vs. NORTH MUSKEGON POLICE DEPARTMENT, ET AL., Defendants-Appellants	NO. 83-1379

ORDER

This matter is before the Court in consideration of the appellants' motion to stay issuance of the mandate, pending application for writ of certiorari. Subsequent to the motion, appellants' petition for rehearing en banc was denied, and the mandate was issued eight (8) days later. As the mandate was issued improvidently, the motion to stay issuance is hereby construed as a motion to recall the mandate; and,

It is ORDERED that the motion, as construed, be, and it hereby is, granted.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk
John P. Hehman /s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD BRIGGS, Plaintiff, v. NORTH MUSKEGON POLICE DEPARTMENT, City of North Muskegon and City Commissioners and Police Chief, Defendants.	File No. G80-96 CA6

OPINION

This is an action pursuant to 42 U.S.C. § 1983 seeking compensatory and punitive damages for the allegedly unlawful dismissal of plaintiff from his job as a police officer with the defendant police department. The parties are in agreement that the reason for the dismissal was that plaintiff, a married man, was cohabiting with a married woman not his wife. Plaintiff claims that the dismissal violated his associational and privacy rights protected by the United States Constitution, and that he was treated differently from other individuals who were similarly situated. This matter was tried before the Court, and this Opinion shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52.

Plaintiff commenced his employment as a part-time police officer in 1969, and it is undisputed that he performed his

duties satisfactorily up to the time of his suspension on February 15, 1977. The events leading up to his suspension began with his separation from his wife in January, 1977.[1] Plaintiff and Cynthia Secrest moved in February, 1977 into an apartment located about one block from the main business center of North Muskegon. The city is a small residential community located on a peninsula containing about one and a half square miles with a population of about 4,000. Plaintiff admits that their cohabitation relationship included the sharing of sexual intimacies. It was plaintiff himself who brought his new living arrangements to the attention of Police Chief Harold Mirkle. The City Council then directed the City Superintendent to order Police Chief Mirkle to place plaintiff on suspension. On February 15, 1977 plaintiff was suspended, in the words of the Superintendent's memo to the Chief, "until such time it is decided his actions are not unbecoming a police officer for the City of North Muskegon."

On July 1, 1977, plantiff was informed that he was terminated retroactive to the date of suspension and that he would be afforded a hearing. Plaintiff was duly notified of a hearing before the City Council which was conducted on August 29, 1977. At the hearing, plaintiff admitted that he was still cohabiting with Ms. Secrest within the city and was informed by the City Attorney that there was a state statute relating to illegal cohabitation.[2] Plaintiff presented a prepared statement expressing his opinon that such statute was antiquated and unenforceable. Plaintiff also informed the City Council that he intended to continue cohabiting with Ms. Secrest. On September 19, 1977, the Council voted to deny plaintiff's request for reinstatement.

Plaintiff contends that defendants' acts have intruded upon his constitutionally-guaranteed rights of privacy and association. He further contends that such intrusion is unjustified because defendants have failed to demonstrate even a rational

relationship between plaintiff's private, off-duty living arrangements and the performance of his duties. Plaintiff also asserts that he was treated differently than another individual who allegedly was engaging in the same course of conduct. Defendants argue that the dismissal was justified because plaintiff's off-duty conduct adversely affected or had the potential to adversely affect his performance on the job, and because local law enforcement officers can be required as a condition of their employment to conform their conduct to the requirements of the law.

A constitutionally guaranteed right to free association has been inferred by the Supreme Court from the First Amendment protection of speech and assembly, *NAACP v. Alabama,* 357 U.S. 449, 460-63 (1958), and a right of privacy has been found in several provisions of the Constitution, *Griswold v. Connecticut,* 381 U.S. 479, 484-86 (1965). Where these rights come into conflict with interests of state and local governments the legitimate rights of the parties must be reconciled in a manner that is consistent with the Constitution. When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights, *see Pickering v. Board of Education,* 391 U.S. 563 (1968), but it has greater latitude in restricting the activities of its employees than of its citizens in general. *Kelly v. Johnson,* 425 U.S. 238, 245 (1976). Whether the private activities of a public employee can constitute valid grounds for dismissal requires careful consideration of both the interests of the individual and the interests of the government.[3]

The right of privacy upon which plaintiff relies was the basis in *Griswold* for holding unconstitutional a statute prohibiting the use of contraceptives. A number of specific guarantees in the Bill of Rights were found to have penumbras that create a zone of privacy which encompass the marital relationship. The result was extended to unmarried persons

in *Eisenstadt v. Baird,* 405 U.S. 438 (1972) on equal protection grounds, and the Court went on to declare:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453 (emphasis in original). The constitutional right of privacy includes "the interest in independence in making certain kinds of important decisions." *Whalen* v. *Roe,* 429 U.S. 589, 599-600 (1977). Although the outer limits of this right have not been established, "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *Carey v. Population Services International,* 431 U.S. 678, 684-85 (1977) (citations omitted).

These cases have formed the foundation for arguments that the constitutional right to privacy extends to sexual conduct in intimate relationships between unmarried individuals:

> The argument, then, is this:
> Marriage exists to facilitate the expression of emotional and sexual intimacy. That intimacy is so fundamental to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection.

Note, Fornication, Cohabitation and the Constitution, 77 Mich. L. Rev. 252, 291 (1978). Some courts have specifically held that the right of privacy protects sexual freedom. *E.g., State v. Saunders,* 75 N.J. 200, 381 A.2d 333 (1977) (fornication statute violates right of privacy). It has also been held that the off duty-private sexual conduct of public employees is protected by the constitutional right of privacy. *E.g., Shuman v. City of Philadelphia,* 470 F. Supp. 449 (E.D. Pa. 1979). Many commentators have argued that the constitutional right of privacy extends to sexual freedom for the unmarried, *e.g.,* Developments in the Law — The Constitution and the Family, 93 Harv. L. Rev. 1156, 1289-1296 (1980), but one recent analysis contends that the Court has given no support to such a notion. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 517-544 (1983).

The similarity between the interests of an unmarried couple in choosing to live together, and the interests in personal privacy and freedom of association previously recognized by the Court as fundamental, was noted by Justice Marshall in his dissent to the denial of certiorari in *Hollenbaugh v. Carnegie Free Library,* 439 U.S. 1052 (1978). *See* Note, Constitutional Law — A Missed Opportunity for Clarification of the Privacy Right, 4 Western New England Law Review 171 (1981). In particular, J. Marshall referred to the plurality opinion in *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977), holding that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *See also* Karst, The Freedom of Intimate Association, 89 Yale Law Journal 624 (1980).

The Supreme Court has observed that it "has not definitively answered the difficult question whether and to what extent

the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey,* 431 U.S. at 694 n. 17. Justice Rehnquist took issue with that statement, believing that the facial constitutional validity of criminal statutes prohibiting certain consensual acts was established in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976). *Carey,* 431 U.S. at 718 n.2. In *Doe* the Court summarily affirmed a three-judge federal court's refusal to declare Virginia's sodomy statute unconstitutional as applied to private consensual homosexual relations. The significance of this summary affirmance has been the subject of much discussion. *See* Note, Constitutional Law — A Missed Opportunity, *supra,* at 181. It certainly seems fair to say that the question has not been "definitively answered."

A good argument can be made that the privacy and associational interests implicated in plaintiff's choice to live with a woman not his wife partake of the fundamental nature of rights which have been held to be "basic values implicit in the concept of ordered liberty." *Griswold,* 381 U.S. at 500 (Harlan, J., concurring). The identification of sexual privacy as a fundamental right can proceed from and be limited by its functional analogy to the recognized fundamental right of marital privacy. Marital privacy is fundamental because an examination of the "traditions and [collective] conscience of our people" demonstrate that it is at the core of the venerable and lofty institution of marriage in our society. *Griswold,* 381 U.S. at 486 (Goldberg, J., concurring). Once identified as a fundamental right, the scope of marital privacy can be determined by a principled interpretation and analysis of its function. *See* Note, Developments — The Family, *supra,* at 1177-87. As Justice Powell stated in *Moore,* extending constitutional protection beyond the traditional family, "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid

applying the force and rationale of these precedents to the family's choice involved in this case." 431 U.S. at 501.

Although an examination of our traditions with respect to sexual privacy yields ambivalent results, *see* Note — Cohabitation, *supra*, at 266-71, 291-93, a consideration of function is arguably more helpful. A right of sexual privacy would afford protection to an informal marriage which serves the same function as a formal marriage in being founded on a relationship characterized by intimacy, voluntary commitment, stability, psychological involvement, and in the hetersexual context, procreative potential. *See* Note, Developments —The Family, *supra*, at 1289-96. It has also been noted that the idea that the intimate relationship, rather than the formal marriage ceremony, is the essence of marriage finds support in the tradition of common-law marriage. *Id.* at 1291.

Without necessarily addressing such arguments, several courts have held that sexual conduct outside marriage is not protected by the First or Fourteenth Amendments. *Baron v. Meloni*, 556 F. Supp. 796 (W.D. N.Y. 1983); *Suddarth v. Slane*, 539 F. Supp. 612 (WD Va 1982); *Johnson v San Jacinto Jr. College*, 498 F. Supp. 555 (S.D. Tex. 1980); *Wilson v. Swing*, 463 F. Supp. 555 (M.D. N.C. 1978); *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *cert. denied*, 439 U.S. 1052 (1978). Others have reached the opposite conclusion. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *New York v. Onofre*, 434 N.Y.S. 2d 947 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Shuman, supra; State v. Saunders, supra; Smith v. Price*, 446 F. Supp. 828 (M.D. Ga. 1977), *rev'd on other grounds*, 616 F.2d 1371 (5th Cir. 1980); *Krzyzewski v. Metropolitan Government of Nashville*, 14 E.P.D. ¶ 7725 (E.D. Ill. 1977); *Drake v. Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974); *Fisher v. Snyder*, 346 F. Supp 396 (D. Neb. 1972) *aff'd*, 476 F.2d 375 (8th Cir. 1973); *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). *See also Fabio v. Civil Service Commission*, 414 A.2d 82, 9 ALR 4th 600 (Pa. 1980).

Notwithstanding cases to the contrary, this Court concludes that better logic supports the view which upholds the constitutional right of sexual privacy. Accordingly, the Court is of the opinion that the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendants' acts on more than a minimal rationality basis. *See Smith v. Price*, 616 F.2d 1371, 1375 (5th Cir. 1980). *Cf. Kelley v. Johnson*, 425 U.S. 238 (1976) (asserted substantive liberty interest of police officer in matters of personal appearance assumed to be protected by Fourteenth Amendment, but state interests underlying infringing regulation only subjected to rational relation test); *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) (finding rational connection between exigencies of Department discipline and police personnel rule forbidding cohabitation among officers).

Addressing the goverment interests involved here, defendants contend that plaintiff's suspension and dismissal were justified because plaintiff's off-duty conduct adversely affected his ability to perform his job. The effect of knowledge of his illegal conduct in the community was likely to be a loss of credibility with the citizens, it is argued. Defendants also introduced evidence designed to show that plaintiff's ability to perform his job was actually affected by his off-duty conduct. This evidence included claims that plaintiff was depressed and saw a psychiatrist, testimony that another officer asked not to be assigned on patrol with plaintiff, and evidence that plaintiff's wife once called the police because she was fearful of a potentially violent confrontation between plaintiff and the ex-husband of plaintiff's cohabitant.

The Court finds unpersuasive the evidence that plaintiff's behavior showed that his off-duty conduct actually had an adverse effect on his ability to perform his job. For example, the reason that plaintiff saw a psychiatrist was that his full-time employer regularly required reviews of employees entrusted with large sums of money. Much of the evidence can be characterized as vague accounts of incidents that may have occurred after plaintiff's suspension. The more difficult issue is whether the likely adverse effect of plaintiff's off-duty conduct on his job performance justified his suspension and dismissal.

Defendants argue that the community's standards would disapprove of plaintiff's conduct, that in such a small community his conduct was or soon would be public knowledge, and that citizens would therefore lose respect for plaintiff in particular and the police force in general. Some courts have indeed emphasized the significant state interest in "the public's perception of law enforcement," *Baron*, 556 F. Supp. at 800-01; in "deterring conduct of employees which is such as to bring the [police department] into disrepute," *Suddarth*, 539 F. Supp. at 618; in "the maintenance of public respect for police officers," *Fabio*, 9 ALR 4th at 611; and in preventing police officers' conduct which "casts a poor light on the Department as a whole," *Wilson*, 463 F. Supp. at 563.[4]

This Court rejects the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion. As the *Fabio* court said, "The government must tread lightly when it investigates and regulates the private activities of its employees. Public employers must be careful not to transform anachronistic notions of unacceptable social conduct into law." 9 ALR 4th at 611-12.

The Court believes that *Shuman* accurately states the better view.

> [W]e are compelled to conclude that there are many areas of a police officer's private life and sexual behavior which are simply beyond the scope of any reasonable investigation by the Department because of the tenuous relationship between such activity and the officer's performance on the job. In the absence of a showing that a policeman's private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionalty protected right of privacy.

450 F. Supp. at 459.

Without doubt, the police department has a legitimate interest in the personal sexual activities and living arrangements of its officers where such activities affect their job performance. However, the Court finds from the evidence that the effectiveness of plaintiff had not been impaired at the time of his suspension and subsequent discharge. In fact, the evidence supports the contrary conclusion. The police chief and others all testify that plaintiff was a good officer doing a satisfactory job.

A more troubling argument is made that plaintiff is in violation of a criminal statute which makes unlawful cohabitation of unmarried persons in a "lewd and lascivious" manner.

Since the statute makes lewd and lascivious conduct necessary to be in violation of the statute, it must be determined what these terms mean.

In *Morgan v. City of Detroit*, 389 F. Supp. 922, 929 (E.D. Mich. 1975), the Court stated:

Although several Michigan statutes include the word "lewd," *see*, eg. M.S.A. § 28.567, § 28.571, § 28.575(1), M.C.L.A. §§ 750.335, 750.339, 750.343a, there are no reported Michigan opinions defining the term.

In other jurisdictions the word lewd has been variously defined as meaning lustful, *Shreveport v. Wilson*, 145 La. 906, 83 So. 186 (1919); involving unlawful sexual desire, *Jamison v. State*, 117 Tenn. 58, 94 S.W. 675 (1906); dissolute, *State v. Lawrence*, 19 Neb. 307, 27 N.W. 126 (1886); filthy, *State v. Rose*, 147 La. 243, 84 So. 643 (1920); lascivious, *Shreveport v. Wilson, supra*, lecherous, *State v. Rose, supra*; and libidinous, *Snow v. Witcher*, 31 N.C. 345 (1848).

> More recently courts have defined "lewd" as that form of immorality which has relation to sexual impurity or incontinence carried on in a wanton manner, *State v. Prejean*, 216 La. 1072, 45 So.2d 627 (1950); that form of immorality which has relation to sexual impurity, *Slusser v. State*, 155 Tex. Cr. R. 160, 232 S.W. 2d 727 (1950); and, in a different sense, as lay, unlearned, unlettered, wicked, lawless, bad, vicious, worthless, base, *State v. Saibold*, 213 La. 415, 34 So.2d 909 (1948).

It is evident that the term "lewd" has no commonly accepted definition. A serious argument could be made that the statute is unconstitutionally vague. However, the plaintiff has not challenged the constitutionality of the statute and the Court need not reach that question. It is not clear that plaintiff has violated the statute. Cohabitating with one who is not one's wife is not, without more, lewd and lascivious conduct. Although plaintiff admits having sexual relations with the woman with whom he was living, there is no evidence that such was in a lewd, lustful, lascivious or licentious manner. There is no evidence that the relationship was open or notoriety. There

is no evidence that plaintiff appeared at public events or "flaunted" this relationship. It is not sufficient to be unmarried and cohabitate together in order to violate the statute the activity must be done lewdly and lasciviously.

There is nothing in the record which suggests that the relationship in which the plaintiff was involved had sex as its primary objective.[5] Indeed, the record shows that plaintiff has lived with this woman from the time of his suspension up to the present time. The Court cannot, based upon the evidence, characterize this relationship as "filthy," "libidinous," "wanton," "wicked," "vicious" or "dissolute." In short, the evidence does not support the conclusion that the cohabitation was lewd and lascivious. The Court concludes that there is insufficient evidence indicating that plaintiff is in violation of the statute. Therefore, defendants arguments that they were justified in discharging plaintiff because he was in violation of the statute is without merit.

Finally, a review of the testimony convinces this Court that the evidence relating to plaintiff's job-performance and the argument that he violated the cohabitation and the adultery statutes are pretextual.[6] The Court is of the opinion that the "real" reason for the discharge of plaintiff is that his conduct did not conform with what the defendants perceived to have been the morals of the community. He was discharged because of what defendants anticipated the reaction of the community would be. Even if this is a relevant consideration, there is no evidence as to what, in fact, that reaction was. Constitution rights should not depend upon popularity polls or the whims of public opinion.

Plaintiff also claims he was subject to disparate treatment, but the evidence did not support his claim. The police chief investigated an allegation that another officer was living in a similar circumstance, but it could not be substantiated. The

other officer did not admit cohabitation as plaintiff did, and it was not clear that a joint residence had been established. In another incident of alleged misconduct involving a tire swap, one employee was demoted and the Chief resigned even though it was not clear that any crime had been committed. The Court finds that plaintiffs discharge did not subject him to wrongful disparate treatment.

For the reasons stated, the Court concludes that the discharge of plaintiff from his position as a part-time police officer violated his constitutional rights. Judgment will be entered in favor of plaintiff.

Benjamin F. Gibson /s/
BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

Dated: May 5, 1983

FOOTNOTES

[1]

Plaintiff was subsequently divorced in October, 1977, and his cohabitant was divorced in June or July of 1977.

[2]

M.C.L.A. § 750.335 provides as follows:

> Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year, or by fine of not more than $500.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense.

Defendants also point to the statutory prohibition of adultery, but the scope of the state's interest in such conduct is defined as limited to situations in which there is a complaint from the spouse, which did not occur here. *See* M.C.L.A. § 750.31.

[3]

See generally Note, Application of the Constitutional Privacy Right to Exclusions and Dismissals from Public Employment, 1973 Duke Law Journal 1037.

[4]

See generally Annotation, Sexual Misconduct or Irregularity as Amounting to "Conduct Unbecoming an Officer," Justifying Officer's Demotion or Removal or Suspension From Duty, 9 ALR 4th 614 (1981).

[5]

Indeed, even if sex were the primary motive of the cohabitation, there is serious question whether this fact would be relevant. In *People* v. *Danielac*, 38 Mich. App. 230, the court held sexual intercourse *in the presence of others* did not constitute gross indecency (emphasis added). This is indicative of the present attitude of the Michigan appellate courts towards matters involving sex. Surely, sexual relations in private between unmarried persons is significally less offensive.

[6]

It should be noted that no efforts were made to prosecute plaintiff as being in violation of either statute.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED—May 26 10:41 AM '83
Clerk, U.S. Dist Court
Western Dist of Mich

RICHARD BRIGGS, Plaintiff, v. NORTH MUSKEGON POLICE DEPARTMENT, et al., Defendants.	File No. G80-96 CA6

JUDGMENT

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 26th day of May, 1983.

PRESENT: HONORABLE BENJAMIN F. GIBSON,
DISTRICT JUDGE

In its Opinion dated May 5, 1983, the Court held that the discharge of plaintiff from his position as a part-time police officer with the City of North Muskegon violated his constitutional rights. A hearing was held on May 16, 1983, for the purpose of determining appropriate relief. The Court has now heard arguments from counsel regarding what damages, if any, should be awarded. Consideration was given to the question of possible reinstatement of the plaintiff to his previous position as a part-time police officer. The Court also heard arguments regarding assessing punitive damages against the individual defendants. Giving due consideration to the relevant factors in the record and being fully advised in the premises,

IT IS HEREBY ORDERED that Judgment shall enter in favor of the plaintiff, Richard Briggs, and against the defendants in the amount of $35,000.00 as compensatory damages which shall include plaintiff's lost wages up to the present time, as well as the mental anguish and humiliation suffered as a result of violations of his constitutional rights. The proofs do not support an award for future wage loss nor for punitive damages.

IT IS FURTHER ORDERED that plaintiff shall be awarded the statutory costs, interest and a reasonable attorney fee.

Benjamin F. Gibson /s/
BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

Certified As A True Copy
Gerald H. Liefer, Clerk

By M. Ferriera /s/
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date May 26, 1983